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Attorneys for Plaintiffs ACER INC., ACER  
AMERICA CORPORATION and GATEWAY,  
INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ACER INC., ACER AMERICA  
CORPORATION AND GATEWAY, INC.

Plaintiffs,

vs.

TECHNOLOGY PROPERTIES LIMITED,  
PATRIOT SCIENTIFIC CORPORATION,  
AND ALLIACENSE LIMITED,

Defendants.

AND RELATED CROSS ACTIONS.

Case No.: 5:08-CV-00877 JF (HRL)

**DISCOVERY MATTER**

**DECLARATION OF JAS DHILLON IN  
SUPPORT OF PLAINTIFFS' EX PARTE  
MOTION FOR IMMEDIATE  
RESOLUTION OF DISPUTE OVER TWO  
ALLEGEDLY PRIVILEGED  
DOCUMENTS**

Date: November 2, 2010  
Time: 10:00 a.m.  
Dept: Courtroom 2, 5th Floor  
Before: Magistrate Judge Howard Lloyd

1 I, Jas Dhillon, declare:

2 1. I am an attorney licensed to practice law before all courts in the State of California,  
3 and the United States District Court for the Northern District of California. I am an attorney at K&L  
4 Gates LLP in its San Francisco, California office and I, along with other attorneys at K&L Gates  
5 LLP, am attorney of record for Acer Inc., Acer America Corporation and Gateway, Inc. (collectively  
6 "Acer"). I submit this declaration in support of Acer's *Ex Parte* Motion for Immediate Resolution of  
7 Dispute Over Two Allegedly Privileged Documents.

8 2. I have personal knowledge of the matters set forth herein except as to those matters set  
9 forth on information and belief, and as to those I am informed and believe them to be true and could  
10 and would competently testify thereto.

11 3. Attached hereto as Exhibit 1 is a true and correct copy of Defendant Technology  
12 Properties Limited, Inc.'s Complaint for Patent Infringement against Fujitsu Limited, et al., United  
13 States District Court for the Eastern District of Texas Marshall Division Case No. 2-05CV-494, filed  
14 on October 24, 2005.

15 4. Attached hereto as Exhibit 2 is a true and correct copy of Plaintiffs' Subpoena to  
16 Testify at a Deposition in a Civil Action to Charles H. Moore, dated May 26, 2010,

17 5. Attached hereto as Exhibit 3 is a true and correct copy of Plaintiffs' Notice of Taking  
18 Deposition of Charles H. Moore and Request for Production of Documents and Certificate of Service,  
19 dated September 3, 2010.

20 6. Attached hereto as Exhibit 4 is a true and correct copy of Plaintiffs' Amended Notice  
21 of Subpoena to Charles H. Moore for Production of Documents and Certificate of Service, dated  
22 September 29, 2010.

23 7. Attached hereto as Exhibit 5 is a true and correct copy of an email exchange among  
24 P. Alsdorf, E. Mar, S. Skaff, J. Cooper, W. Wicker, H. Davis, Jr., T. Walker, J. Dhillon and J.  
25 Ratinoff, dated October 20, 2010.

26 8. Exhibit 6 to this declaration is a true and correct copy of an email "mac336" produced  
27 by Charles Moore in response to Acer's document subpoena, which TPL claims is allegedly  
28 privileged. This exhibit is being separately filed under seal concurrently herewith.

1           9.       Exhibit 7 to this declaration is a true and correct copy of an email "Moore0058"  
2 produced by Charles Moore in response to Acer's document subpoena, which TPL claims is allegedly  
3 privileged. This exhibit is being separately filed under seal concurrently herewith.

4           10.      Attached hereto as Exhibit 8 is a true and correct copy of Charles Moore's Complaint  
5 against TPL *et al.* for fraud, breach of fiduciary duty, and breach of contract, Santa Clara County  
6 State Court, Case No. 110-cv-183613, filed on September 27, 2010.

7           11.      On September 30, 2010, Acer served non-party Charles Moore a document and  
8 deposition subpoena. Mr. Moore complied with the subpoena by turning over responsive documents  
9 on October 15 and 18, 2010. These productions consisted of 58 printed pages of material and a CD  
10 containing a few hundred additional pages of material. At issue are MOORE00058, an August 14,  
11 2008 e-mail from Mr. Moore to Mr. Mac Leckrone and Mr. Larry E. Hennenman and mac336.pdf,  
12 another e-mail communication.

13           12.      Although Acer provided TPL advanced notice of the document subpoena issued for  
14 non-party Charles Moore, TPL made no effort to object to the subpoena on grounds of privilege prior  
15 to Mr. Moore's compliance date. It was not until *after* that date had passed and after Moore had  
16 produced documents that TPL notified Acer that it allegedly had a common interest with Moore and  
17 that two emails produced by Moore were purportedly privileged. At no time prior to responding did  
18 Moore serve written objections or otherwise express any concerns regarding the subpoena calling for  
19 any privileged documents. Mr. Moore has not expressed any concerns regarding the subpoena  
20 calling for any privileged documents.

21           13.      Despite having notice of Acer's document requests directed to Moore since early  
22 September 2010, TPL did not file any objections or have any comments with respect to the subpoena  
23 to Mr. Moore. In fact, it was not until October 19, 2010 that TPL claimed two emails produced by  
24 Moore constituted privileged communications between TPL, Moore and TPL's attorneys, who were  
25 retained in conjunction with aforementioned Texas action and USPTO proceedings. TPL further  
26 objected to the production or use of those documents and "other similar materials" at Moore's  
27 deposition.  
28

1           14.     This dispute relates to whether two documents produced by a non-party, in response to  
2 a subpoena without prior objection by the subpoenaed party or any other party to this action, are  
3 privileged. Specifically, there are two primary issues that the Parties disagree over: (1) whether TPL  
4 waived its right to assert any claim of privilege over the emails in question by failing to take steps to  
5 preserve an alleged privilege before Moore produced the two emails in question; and (2) if there was  
6 no such waiver, whether TPL has provided sufficient foundational facts that would establish that the  
7 communications were subject to the attorney-client privilege and the common interest exception  
8 thereto.

9           15.     Mr. Moore is currently scheduled to be deposed on November 3, 2010.

10          16.     Acer has spent months and thousands of dollars locating and serving Mr. Moore with a  
11 deposition subpoena and simply cannot risk any further difficulties in rescheduling the deposition.

12          17.     Acer certifies, pursuant to FRCP 37 and Civil L.R. 37(a)(1), that it has met and  
13 conferred with TPL in good faith to resolve this dispute before filing the current motion.

14          18.     On October 22, 2010, during a meet and confer between the Parties, TPL informed  
15 Acer that Mr. Moore had “agreements” with TPL in or around August 2008. Further, counsel for  
16 TPL informed Acer that it did not understand the nature and scope of the agreements between Mr.  
17 Moore and TPL but instead, was going off of what TPL told counsel. Specifically, counsel for TPL  
18 mentioned that TPL did not identify, to counsel, the type of agreements it had with Mr. Moore.  
19 Without an opportunity to review the agreements, Acer was unable to determine the relationship  
20 between TPL and Mr. Moore.

21          19.     TPL has failed to provide a legal basis that no waiver of its alleged privilege occurred.  
22 TPL also has failed to provide adequate factual and legal support as to why it has the right to assert  
23 its now-waived assertion of privilege over the two documents in question, as well as a basis to object  
24 on those grounds at Moore’s deposition.

25          20.     Nevertheless, Acer has sequestered the two documents in question as required by  
26 FRCP 26(b)(5)(B) pending a resolution of the parties’ dispute over TPL’s claims of privilege.

27          21.     Counsel for TPL also claimed the two documents at issue were privileged under the  
28 common-interest doctrine based on Mr. Moore’s commercial interest in the enforcement of the

1 patents-in-suit. Acer disagreed and explained that the courts have held that such interests are  
2 insufficient to constitute a legal interest relating to the patents-in-suit sufficient to find a common  
3 interest privilege.

4 22. Despite these good faith efforts, the Parties were unable to reach an agreement on the  
5 outstanding issues and have thus, reached an impasse.

6 23. Acer provided notice to TPL of its intent to file this *ex parte* Motion on October 21,  
7 2010.

8 I declare under penalty of perjury under the laws of the United States that the foregoing is true  
9 and correct.

10 Executed on October 22, 2010, at San Francisco, California.

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13 By: /s/ Jas Dhillon /s/  
14 JAS DHILLON  
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